

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JONATHAN E. GOSS**

Claimant

VS.

**CENTURY MANUFACTURING, INC.**

Respondent

AND

**TRAVELERS INDEMNITY CO.**

Insurance Carrier

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Docket No. 1,040,289

**ORDER**

Claimant requested review of the January 9, 2012 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on April 20, 2012, in Wichita, Kansas.

**APPEARANCES**

Phillip R. Fields, of Wichita, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent and its insurance carrier

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The Board notes that the Award lists the preliminary hearing transcripts of July 23, 2009 and July 20, 2010, as part of the record. The Award does not comment on the exhibits admitted at the preliminary hearings. However, both claimant's and respondent's submission letters list both preliminary hearing transcripts and their attached exhibits as part of the record. The Board will therefore consider not only the preliminary hearing transcripts, but also the exhibits attached thereto. The Board also notes claimant's objection to the inclusion of the depositions of Karen Crist Terrill, taken on October 13, 2011, John McMaster, M.D., taken October 19, 2011, Tommy A. McKay, taken on November 1, 2011, and J. Mark Melhorn, M.D., taken on November 10, 2011, alleging that all were taken outside of respondent's terminal date.

### ISSUES

The ALJ adopted the opinion of Dr. Do, the authorized treating physician, and found claimant had an 8 percent impairment to the right shoulder.

Claimant requests review of this decision arguing that he is also entitled to a 69.85 percent work disability for injury to his cervical spine based on the opinion of Dr. Do, or in the alternative a 56.6 percent work disability based on the opinion of Dr. Melhorn. Claimant further argues that the opinions of Dr. Melhorn and Dr. McMaster should not be considered as they were taken after respondent's original terminal date had passed and no timely request for extension was filed.

Claimant also contends that he is entitled to temporary total disability compensation (TTD) for the periods from June 4, 2007 through July 27, 2007, a period of 7.57 weeks and August 10, 2008 through January 2, 2009, a period of 20.57 weeks.

Respondent argues that the ALJ's Award should be affirmed and claimant denied any additional permanent partial disability or work disability benefits as claimant failed to meet his burden of establishing permanent impairment to his neck as a result of his work accident.

### ISSUES

1. What is the record in this matter? Should the depositions of Dr. Melhorn, Dr. McMaster, Tommy A. McKay and Karen Crist Terrill be excluded from this record as respondent failed to timely request an extension of it's terminal date?
2. Did claimant sustain an injury or aggravation to his cervical spine on the date of the accident, thereby entitling him to an Award pursuant to K.S.A. 44-510e, which would include a whole body impairment with resulting work disability benefits?
3. Is claimant entitled to an Award for a work disability under the Kansas Workers Compensation Act (Act)? Does claimant's incarceration disqualify him from receiving work disability benefits under K.S.A. 44-510e?
4. Is claimant entitled to TTD for the weeks listed above?

**FINDINGS OF FACT**

Claimant has been incarcerated since 1986 on a first degree murder conviction. He was at Lansing State Penitentiary from 1988 until 1992, and then was transferred to the El Dorado Correctional Facility. Claimant testified that the El Dorado facility offers opportunities for employment within the prison and one of those opportunities is with Century Manufacturing (Century). Claimant began working for Century on August 1, 1997. His job title was a lathe operator and he also did some soldering and packaging work.

On or about June 4, 2007, while working for Century, claimant suffered an accident when he tripped over a wooden box and fell onto a cement floor, injuring his right shoulder, neck and wrist. Claimant testified that he had been setting up the wood lathe and reached around to grab some tools when his foot caught the edge of the box and it flipped over on him. The box was 12 to 18 inches high.

Claimant testified that this accident was witnessed by Donny Bruce, another inmate and employee of Century. Claimant reported the incident to Kevin Lemaster, David White, and someone named Jamie the same day. Claimant did not ask about getting medical treatment because he didn't feel that it was that serious at the time. He did however leave work early.

The next day, claimant came to work and was unable to handle a wrench. He was escorted to the clinic because the pain in his neck and shoulder was so bad he couldn't stand it. Claimant met with the doctor and was taken off work until he could be seen by board certified orthopedic surgeon, J. Mark Melhorn, M.D., the workers compensation doctor. Claimant was off work for 7 1/2 weeks.<sup>1</sup>

Claimant came under Dr. Melhorn's care on July 27, 2007, after the injury on June 4, 2007. Claimant described pain in his right upper extremity (arm, elbow, shoulder) and neck. X-rays were ordered and revealed some age-related changes at C5-6. The shoulder appeared to have no significant abnormalities other than arthritis in the AC joint. There was no new acute component.

Claimant's symptoms continued into October 2007 and his main complaints were pain in the right shoulder and neck. Claimant agreed that the medication he was prescribed was helping to decrease his symptoms.

Dr. Melhorn provided claimant with treatment, including injections in his right shoulder. Claimant testified that he continually complained of pain in his neck also and asked for an MRI of the neck, but was refused when Dr. Melhorn said that there was

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<sup>1</sup> R.H. Trans. at 9.

nothing wrong with his neck and they would save money by not getting the MRI.<sup>2</sup> At the December 21, 2007 examination, claimant continued to have neck and shoulder discomfort.

Claimant was next seen on May 16, 2008, by Dr. Melhorn. Claimant's complaints at that time again included pain in the neck and right and left shoulders.

Dr. Melhorn last met with claimant on November 13, 2008, at which point claimant was found to be at maximum medical improvement. In his December 23, 2008 report, Dr. Melhorn opined that claimant did not have any permanent impairment from the June 4, 2007, shoulder and neck injuries.

Claimant became unsatisfied with his treatment with Dr. Melhorn and was referred to board certified orthopedic surgeon Pat D. Do, M.D., although, Dr. Do was not initially authorized to treat the claimant. Claimant met with Dr. Do, on April 25, 2009, for an examination. Claimant's complaints were pain in the neck and right shoulder with difficulty turning the neck or raising the shoulder above his head. Claimant was examined and found to have neck pain with right upper extremity radicular symptoms, right shoulder pain with impingement and myofascial pain. Dr. Do felt that claimant needed to have an MRI of the right shoulder and cervical spine and recommended physical therapy. He also thought claimant might benefit from trigger point or epidural injections. Depending on the results of the MRI, claimant might be a candidate for shoulder surgery. Dr. Do became claimant's authorized treating physician on November 17, 2009.

An MRI was performed on claimant's cervical region on August 11, 2010. The test impression included moderate spondylotic changes at C5-6 and C4-5 with mild posterior ridging and narrowing at the anterior subarachnoid space. There was no evidence of pressure on the spinal cord or nerve roots. There was mild to moderate anterior spurring at C4-5. Dr. Do continued to follow claimant's progress and determined from the August 11, 2010 MRI, that claimant had generalized wear and tear in the neck. He did not believe that the degenerative condition in claimant's neck would be causally related to claimant's work accident.

Because the MRI of the right shoulder indicated impingement and a partial rotator cuff tear, claimant underwent right shoulder surgery (rotator cuff repair, arthroscopy with extensive debridement, and right shoulder decompression) on April 14, 2010.

Claimant was found to be at maximum medical improvement for the right shoulder and cervical spine on February 1, 2011, and was assigned permanent work restrictions. Pursuant to the AMA Guides, 4<sup>th</sup> ed., Dr. Do assigned claimant a 5 percent whole person impairment for the cervical spine and an 8 percent permanent partial impairment to the

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<sup>2</sup> R.H. Trans. at 10.

right upper extremity. He combined both impairments for a 10 percent whole person impairment.<sup>3</sup>

Dr. Do testified that it was possible that the pain complaints in claimant's neck were being caused by a degenerative condition in the cervical spine. If this was truly the case then he did not feel that claimant's cervical spine degeneration was causally related to his work accident. He opined that the 5 percent whole person impairment he assigned to the cervical spine was a minor impairment for the myofascial pain in the neck area.<sup>4</sup> He opined that claimant's accident may have aggravated the cervical spine myofascial pain condition. When asked whether the impairment of function ratings were, within a reasonable medical probability, related to the traumatic injury suffered in June 2007, with respondent, he stated "If his history's true, yes."<sup>5</sup>

Vocational expert Steve Benjamin interviewed claimant for a vocational assessment and determined that claimant has performed 31 tasks over the last 15 years. Dr. Do reviewed the task list of Steve Benjamin and opined that out of 31 non-duplicated tasks claimant performed over the last 15 years, claimant can no longer perform 13 tasks for a 42 percent loss. Dr. Do believes that claimant is capable of going back to work as long as he stays within the restrictions assigned to him.

Claimant testified that he doesn't have as much strength as he had before the accident and has a hard time picking up and carrying things. He depends a lot on his left arm. He testified that his arms get numb and tingly a lot and he is always hurting. He wakes up in the middle of the night. He also developed a burning and biting sensation after his right shoulder surgery.<sup>6</sup>

At the regular hearing, claimant testified that he was off work for about seven and a half weeks after the fall, until he saw Dr. Melhorn. As noted above, claimant was first examined by Dr. Melhorn for this accident on July 27, 2007, or 7.57 weeks later. Claimant then returned to work for respondent and last worked for respondent in 2008, "around September" and remained off work until early January of 2009.<sup>7</sup> At that time, claimant began performing custodial work for the prison. That job paid \$1.05 per day with claimant working three to four hours per day five days per week.

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<sup>3</sup> Do Depo., Ex. 7 at 1 (March 10, 2011 letter).

<sup>4</sup> Do Depo. at 27.

<sup>5</sup> Do Depo. at 16.

<sup>6</sup> R.H. Trans. at 39-40

<sup>7</sup> R.H. Trans. at 11. (Note: October 1, 2008 through January 2, 2009 = 13.43 weeks)

After the regular hearing, the ALJ set terminal dates for the parties. Claimant's terminal date was set for August 5, 2011. Claimant's evidence was taken and presented within its terminal date. Respondent's original terminal date was September 6, 2011. On September 9, 2011, respondent filed the first request for an extension of its terminal date. An examination of claimant had been scheduled by respondent with Dr. McMaster on September 7, 2011. An evaluation of claimant by respondent's vocational expert, Karen Terrill was scheduled for September 27, 2011. The Order Extending Terminal Date was filed on September 13, 2011. The Order is dated September 19, 2011. Respondent's terminal date was extended to November 6, 2011. Claimant's response, objecting to the extension was filed with the Court on September 15, 2011. A hearing to address the requested motion was set for September 27, 2011, but apparently never held.

On November 7, 2011, respondent filed a second Motion To Extend Terminal Date. This motion was filed the day after respondent's second terminal date expired on November 6, 2011. Claimant filed a response on November 7, 2011, again objecting to the request. Additionally, claimant requested that the deposition of Dr. Melhorn, scheduled for November 10, 2011, be quashed. No hearings were held regarding the requested extensions or raised objections. During the October 13, 2011, deposition of Karen Crist Terrill, and the October 19, 2011, deposition of John F. McMaster, M.D., claimant objected to the deposition as being taken after respondent's terminal date. No objections were stated at the depositions of Tommy McKay on November 1, 2011, or the deposition of J. Mark Melhorn, M.D., taken on November 10, 2011.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-523(b) states:

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

(2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice

of the appointment sent prior to submission by the claimant; or

(3) on application for good cause shown.

This matter went to regular hearing on July 5, 2011. Respondent's original terminal date was set for September 6, 2011. No action was taken by respondent until the terminal date had run. Then, on September 9, 2011, three days after the expiration of its terminal date, respondent filed a motion requesting an extension of its terminal date, arguing that it had encountered difficulties in arranging a doctor to examine claimant. The Order Extending Terminal Date was dated September 19, 2011. It was somehow filed with the Division on September 13, 2011. Claimant's response and objections were filed on September 15, 2011. No hearing was held on respondent's motion or claimant's objection. Respondent's terminal date was reset for November 6, 2011.

The depositions of Ms. Terrill and Dr. McMaster were taken within this terminal date with claimant lodging objections during those depositions. The deposition of Tommy McKay was taken within the new terminal date time limit. But with no renewed objection lodged by claimant during the deposition. On November 7, 2011, after the second terminal date had run, respondent again requested an extension of its terminal date in order to take the deposition of Dr. Melhorn. Claimant filed an objection on that same day. No order was issued from the ALJ, nor was there a hearing on respondent's request. The deposition of Dr. Melhorn was taken on November 10, 2011, without an on the record objection by claimant at that deposition. However, claimant's written objection was on file with the Division.

Claimant's injury in this matter occurred on June 4, 2007. The matter went to regular hearing on July 5, 2011, over four years later. Respondent requested two extensions of its terminal date, both coming after its then established terminal date had run, citing difficulty in locating a physician who would examine claimant in prison and the difficulty in scheduling with claimant's attorney. This claimant has been incarcerated at the El Dorado Correctional Facility for the entire time this matter has been in litigation. It is difficult to believe that it took respondent over four years to locate a doctor to examine claimant. It appears more likely that respondent waited until the last minute to locate and schedule both the examination and the medical depositions in this matter. This record does not support a finding that respondent made a diligent effort to schedule this medical examination with Dr. McMaster, nor the deposition of Dr. Melhorn. Additionally, the deposition of Dr. Melhorn was taken without the benefit of an order by the ALJ. The motions, on their face do not establish good cause for the requested extensions of respondent's terminal dates and no hearings were held after the extension requests. Timely objections to both requests were made by claimant. The Board finds that the ALJ erred in granting the extensions of respondent's terminal dates. Therefore, the evidence provided to the Division after the original terminal date on September 6, 2011, is excluded from this record.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>8</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>9</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>10</sup>

The ALJ adopted the medical opinions of Dr. Do in awarding claimant an 8 percent impairment to his right upper extremity at the shoulder. No award was allowed for claimant's cervical spine. It is acknowledged that Dr. Do testified that claimant's neck degeneration was not caused by the accident. However, Dr. Do also rated claimant with a 5 percent whole body impairment for myofascial pain condition in and around the cervical spine which he stated may have been aggravated by the accident. Pain in and around claimant's cervical spine was reported by claimant from the time of the original accident. While this record will not support an aggravation of claimant's degenerative cervical condition, it does support a finding that claimant aggravated the myofascial pain condition in his cervical spine. The limit by the ALJ to a scheduled injury is reversed and claimant is awarded an 8 percent impairment to the right upper extremity and an additional 5 percent whole body impairment to the cervical spine for the accident on June 4, 2007. Dr. Do's report of March 10, 2011, states that these two ratings combine, under the AMA Guides, 4<sup>th</sup> ed., to a 10 percent whole person impairment.<sup>11</sup>

The Board's above ruling would appear to exclude the medical opinions of Dr. Melhorn from consideration. However, as noted above, the exhibits from the preliminary

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<sup>8</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>9</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>10</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>11</sup> Do Depo. Ex. 7 (March 10, 2011 letter),



hearings are included in this record. The preliminary hearings contain many of the medical reports and opinions of Dr. Melhorn. It is acknowledged that Dr. Melhorn opined that claimant suffered no permanent impairment as the result of the injuries on June 4, 2007. However, the Board finds the opinions of Dr. Do to be the most persuasive. The award of the ALJ is modified to find claimant suffered a whole person permanent partial impairment of 10 percent.

K.S.A. 44-510c(b)(2) states:

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant requested TTD for the period from June 4, 2007 through July 27, 2007, a period of 7.57 weeks, and August 10, 2008 until January 2, 2009, a period of 20.57 weeks. Claimant testified that he was off work for 7 1/2 weeks after the accident until he was able to see Dr. Melhorn.<sup>12</sup> The Board finds claimant is entitled to 7.57 weeks of TTD for the period from June 4, 2007, through July 27, 2007. Claimant testified that he last worked for respondent "In 2008, around September", and remained off thereafter.<sup>13</sup> However, claimant's testimony is not specific as to why he was off work during that period, and whether he was physically capable of returning to work. Claimant's submission letter to the ALJ requested only 7.57 weeks of TTD. Claimant's request for additional TTD from August 10, 2008 until January 2, 2009, is denied.

K.S.A. 44-510e states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.<sup>14</sup>

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<sup>12</sup> R.H. Trans. at 9.

<sup>13</sup> R.H. Trans. at 11.

<sup>14</sup> K.S.A. 1999 Supp. 44-510e.

The parties have stipulated that claimant was earning \$333.36 per week while working for respondent. Claimant worked this job for several years, leading to the date of accident. After the accident claimant's weekly earnings were severely limited, with claimant only making \$1.05 per day. This calculates to a wage loss of 98 percent.

The only task loss opinion in this record is that of Dr. Do. He opined that claimant had suffered a 42 percent task loss as the result of this injury. Pursuant to K.S.A. 44-510e, this calculates to a work disability of 70 percent. Respondent argues that claimant's incarceration should limit his right to an award to a functional impairment at best.

K.S.A. 44-508(b) states:

(b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, attendants, as defined in subsection (d) of K.S.A. 65-6112, and amendments thereto, drivers of ambulances as defined in subsection (b) of K.S.A. 65-6112, and amendments thereto, firefighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; persons in the service of the state as volunteer members of the Kansas department of civil air patrol, but only to the extent and during such periods as they are officially engaged in the performance of functions specified in K.S.A. 48-3302 and amendments thereto; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

The definition of a "workman" or "employee" or "worker" does not specifically exclude prisoners or inmates from entitlement to a work disability. Claimant, even while in prison, was productively employed. The injury suffered on June 4, 2007, has limited his ability to earn a wage. The Board acknowledges that claimant's labor market is more

limited than a non-inmate. However, the loss suffered by claimant from this accident is no less real than that experienced by a worker outside the walls of a prison. Claimant was in prison when he obtained his job with respondent and his labor market did not change after this accident. Claimant is entitled to a permanent partial general (work) disability of 70 percent.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find that claimant has suffered a permanent partial whole person functional impairment of 10 percent, followed by a permanent partial general disability of 70 percent for the injuries suffered on June 4, 2007. Claimant is also awarded 7.57 weeks of TTD for the period from June 4, 2007 through July 27, 2007. The record is limited to only that evidence presented by the parties on or before the end of respondent's terminal date on September 6, 2011.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 9, 2012, is modified to find that claimant is entitled to a whole body permanent partial functional impairment of 10 percent followed by a permanent partial general disability of 70 percent.

Claimant is entitled to 7.57 weeks of TTD at the rate of \$222.25 per week, totaling \$1,682.43, followed by 41.50 weeks of permanent partial whole body functional disability at the rate of \$222.25 per week, totaling \$9,223.38, for a 10 percent whole body functional impairment, followed by 241.43 weeks permanent partial general disability at the rate of \$222.25 totaling \$53,657.82, for a 70 percent permanent partial general disability, for a total award of \$64,563.63.

As of the date of this award, claimant is entitled to 7.57 weeks TTD at the rate of \$222.25 per week totaling \$1,682.43, followed by 253.57 weeks of permanent partial disability compensation at the rate of \$222.25, totaling \$56,355.94, for a total due and owing of \$58,038.36. Thereafter, claimant is due 29.36 weeks of permanent partial general disability compensation at the rate of \$222.25 per week totaling \$6,525.27, minus any amounts previously paid, until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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John D. Clark, Administrative Law Judge